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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For the District of Columbia Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose 50,000 members primarily represent persons seeking to vindicate their legal rights in personal injury tort actions, civil rights and employment discrimination cases, and commercial litigation.[1]

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than

SUMMARY OF THE ARGUMENT

This case involves an interpretation of 42 U.S.C. §1981a by the court of appeals below that is at odds with the plain text of the statute and undermines the purpose of Congress in enacting this provision.

The decision below prevents the jury in cases of intentional discrimination in employment from considering the appropriateness of punitive damages in all but those cases in which the judge has deemed defendant's conduct to be sufficiently "egregious." The court ruled that, as a matter of law, punitive damages were not available in "typical" or "garden-variety" cases of intentional discrimination.

The plain text of the statute makes the defendant's mental state -- malice or reckless disregard for federally protected rights -- the essential prerequisite for punitive damages. Congress did not provide that such damages were recoverable only where the conduct was also egregious.

Limiting the remedy of punitive damages to the uncommon case of egregious misconduct undermines the statutory objective of ridding the workplace of bigotry. The punitive damage remedy is expecially important in combatting discrimination in promotion decisions and other situations where compensatory damages may not be great enough to deter future misconduct.

To accomplish the goal of the civil rights statutes, punitive damages should be available in cases where the defendant knew or should have known that its conduct was

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amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief. Letters of consent by the parties to the filing of this brief have been filed with this Court.

unlawful. This standard is familiar to courts and is applied routinely.

Even if the statutory text could support the lower court's additional requirement of a judicial determination of egregious conduct as a prerequisite to punitive damages, such an interpretation intrudes on the constitutionally protected role of the jury.

Jury discretion and expression of community values have characterized punitive damages from their common law inception. Moreover, the history of the Seventh Amendment emphasizes the importance of preserving the jury's role against encroachment by judges. In interpreting §1981a with respect to the relationship between judge and jury, this Court should preserve the constitutionally protected role of the jury.

ARGUMENT

I. THE DECISION BELOW UNDERMINES THE PURPOSE OF §1981a BY PREVENTING JURY CONSIDERATION OF PUNITIVE DAMAGES WHERE THE JUDGE HAS DETERMINED THAT THE CONDUCT WAS NOT SUFFICIENTLY "EGREGIOUS."

Petitioner Carole Kolstad alleged that her employer, Respondent American Dental Association, failed to promote her because of her gender, in violation of the Civil Rights Act of 1964, Title VII, as amended. The jury resolved the issue of liability in Kolstad's favor, awarding compensatory damages. However, the district court refused to instruct the jury on the issue of punitive damages.

The Court of Appeals, *en banc*, addressed the single question "whether the standard of evidence for punitive damages under Title VII is, in all but a narrow range of cases, no higher than the standard of liability." 139 F.3d at 960. Having thus framed the issue, the court held that "punitive

damages in a Title VII case may be imposed only on a showing of egregious conduct." *Id.*

In the course of its opinion, the court repeated its view that punitive damages should not be available "in the standard case of intentional discrimination under Title VII," *id.*; "in the typical run of Title VII cases," id. at 962; or in "every garden-variety disparate treatment case" id at 968, even where the jury in such cases might find that the defendant acted "with malice or with reckless indifference" to plaintiff's federally protected rights. Instead, the court ruled that the jury may make its determination only in those relatively infrequent instances where, in the estimation of the judge, the defendant has displayed sufficiently "egregious" or "truly outrageous acts of discrimination." *Id.* at 969 n.9.

This artificial threshold, which has no support in the text of statute and which would limit the remedy of punitive damages to a relatively small number of unusual cases of intentional discrimination, severely undermines the policies and purposes of §1981a. In addition, as Amicus discusses in Part II, *infra*, allocating to the trial judge the determination of whether a defendant's conduct merits punitive damages intrudes on the constitutionally protected role of the jury.

A. The Purpose of Section 1981a Is to Punish and Deter Employers Who Engage In Intentional Discrimination With Malice or Reckless Disregard of Federally Protected Rights, Regardless of Whether the Conduct Is Egregious.

The relevant portion of 42 U.S.C. §1981a provides:

> **(a) Right of Recovery**
>
> **(1) Civil Rights**
>
> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5), . . . the complaining party may recover compensatory and punitive damages as allowed under subsection (b) of this section . . .

> **(b) Compensatory and Punitive Damages**
>
> **(1) Determination of punitive damages**
>
> A complaining party may recover punitive damages under this section . . . if the complaining party demonstrates that the respondent engaged in discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

The plain text of §1981a(b)(1) focuses the jury's attention on defendant's mental state as the prerequisite for an award of punitive damages. In short, Congress selected the powerful weapon of punitive damages to punish and deter bigotry in the workplace.

The lower court recognized that "malice" and "reckless indifference" are mental states, but stated that these terms are too "malleable and ambiguous" to serve as the basis for the jury's imposition of punitive damages. 139 F.3d at 962. The court gave little weight to this Court's decision in *Smith v. Wade*, 461 U.S. 30 (1983), from which Congress selected this language. Explicitly rejecting arguments that these terms are too vague, this Court held:

> [A] jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.

Id. at 56.

The court of appeals in this case, however, held that punitive damages may be imposed only where the defendant's *conduct* is also "egregious." Egregious conduct, by definition, is unusual or uncommon. The court declined "to define this requirement with specificity." 139 F.3d at 965. One judge may look to whether the discriminatory conduct affected a significant number of employees. For another, a repeated pattern of discriminatory conduct would qualify. Yet another

may look for especially odious comments accompanying the discrimination. What the court of appeals made clear, however, is that, as a matter of law, juries may not consider punitive damages in "typical" or "garden-variety" instances of intentional discrimination.

Congress could have limited the availability of punitive damages to those exceptional cases involving not only the prohibited mental state but also egregious misconduct. That Congress did not indicates the legislators' recognition that, unhappily, instances of bigotry within the employment context are all too common and should be the subject of punitive damages wherever they occur. By limiting this remedy to relatively uncommon instances of egregious misconduct, the lower court undermines and contradicts Congress's purpose.

B. The Plain Text Of §1981a Makes The Mental State Of The Defendant, Not The Egregious Nature Of The Conduct, The Basis For Punitive Damages.

The statutory text makes clear that the employer's awareness of its wrongful conduct is the gravamen of a punitive damages award. Where "the intent of Congress is clear, that is the end of the matter for the court . . . must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

The court of appeals stated that its decision "aligns us with all but one of the several circuit courts to address this question." 139 F.3d at 968. However, the court failed to recognize that even among those circuits applying a "heightened" standard for recovery of punitive damages, the courts focused on the defendant's intent, not conduct. For example, adopting a heightened standard for punitive damages, the court in *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299 (9th Cir. 1998), nevertheless emphasized that it was not "egregious conduct," but a mental state that was the prerequisite for a finding of punitive damages.

> Under the heightened standard adopted in these cases, intentional acts of discrimination giving rise to section 1981 liability do not warrant punitive damages unless they evince "malice or reckless or callous indifference of an egregious character," *Beauford v. Sisters of Mercy-Province of Detroit*, 816 F.2d 1104, 1109 (6th Cir. 1987), or a comparably reprehensible intent.

Id. at 1302-03. The Ninth Circuit adopted the "almost certainly knew" standard employed by the Seventh Circuit.

> Thus, to be entitled to an award of punitive damages, the plaintiff must demonstrate that the defendant "almost certainly knew that what he was doing was wrongful and subject to punishment." *Soderbeck v. Burnett County*, 752 F.2d 285, 291 (7th Cir. 1985).

Id. at 1304.

In *EEOC v. Wal Mart Stores*, 156 F.3d 989 (9th Cir. 1998), the Ninth Circuit applied that same standard to reverse a district court's refusal of a punitive damages instruction. The jury there returned a verdict in favor of appellant EEOC, finding that the defendant had intentionally discriminated against a job applicant based on her pregnancy, in violation of Title VII. The district court refused the EEOC's request for an instruction to the jury on the issue of punitive damages, ruling that a heightened standard is required. *Id.* at 991.

In reversing the district court, the Ninth Circuit acknowledged its recent ruling in *Ngo v. Reno Hilton Resort Corp.*, *supra*, that "to be entitled to an award of punitive damages, the plaintiff must demonstrate that the defendant 'almost certainly knew that what he was doing was wrongful and subject to punishment.'" *Id.* at 992. The court ruled that even this so-called heightened standard was satisfied by evidence that "Wal-Mart's decision-makers deliberately rejected [the employee] because of her pregnancy and conspired to cover up their unlawful discrimination by fabricating an interview that never took place." *Id.* The Ninth Circuit distinguished *Ngo* on the basis that there existed more

than "negligent decision making" and "poor communications among managers." *Id.* The EEOC's evidence of discriminatory intent was sufficient to support an instruction on the subject of punitive damages. Under these circumstances, the defendant "almost certainly knew that [its] conduct was wrongful." *Id.*

Other circuits have found that evidence, direct or circumstantial, that the defendant was motivated by bigotry should always suffice to meet this test, even in "garden-variety" disparate treatment cases. *Harris v. L & L Wings Inc.*, 132 F.3d 978, 982 (4th Cir. 1997)(affirming a punitive damages award based on evidence of reckless indifference to federally protected rights where the employer completely failed to address repeated complaints of pervasive sexual harassment); *Luciano v. Olsten Corp.*, 110 F.3d 210, 220-22 (2d Cir. 1997)(affirming a punitive damages award where the employer drew up an impossible job description for a female employee designed to ensure that her performance would be unsatisfactory, and then terminated her); *Merriweather v. Family Dollar Stores of Indiana, Inc.*, 103 F.3d 576, 582 (7th Cir. 1996) (affirming an award of punitive damages where the defendant had terminated the plaintiff's employment for refusing to withdraw her discrimination claim, and gave false reasons for terminating her); *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 637 (7th Cir. 1996)(affirming a punitive damages award based on evidence of at least reckless indifference where the owner of the defendant corporation and other high-level executives had a stated policy against women holding positions in upper-level management); *Yarborough v. Tower Oldsmobile, Inc.*, 789 F.2d 508, 514 (7th Cir. 1986)(affirming a punitive damages award where the defendant's "ill will against the plaintiff, or callous indifference to his federally protected rights" was evidenced by the defendant's failure to respond to complaints by the African-American plaintiff that he was assigned by a manager to an

inferior work area, to do less lucrative work, based on his race).

C. The Punitive Damage Remedy Is Especially Important to Further the Goals of §1981a in "Garden-Variety" Employment Discrimination Cases.

Congress selected the remedy of punitive damages to advance the primary purpose of Title VII: To eliminate discrimination by deterring future illegal employment practices. *See McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995)("The ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'. . . Deterrence is one object of these statutes."); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982)("The 'primary objective' of Title VII is to bring employment discrimination to an end.").

Deterrence is undeniably the purpose of punitive damages. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). This Court has recognized that this remedy is of particular importance in the context of deprivations of civil rights, where compensatory damages alone cannot be counted on to deter misconduct. As the Court pointed out in *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269-70 (1981), by "allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute [42 U.S.C. § 1983] directly advances the public's interest in preventing repeated constitutional deprivations." In *Carlson v. Green*, 446 U.S. 14 (1980), the Court further explained that "punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury." *Id.* at 22. n.9.

Punitive damages serve a similar purpose in furthering the congressional objective of eliminating employment

discrimination. In a substantial number of cases where the defendant knew it was violating the law, the combination of compensatory damages and injunctive relief is insufficient to deter illegal discrimination.

This Court has previously considered the standard to be applied on the issue of whether to award simple backpay under Title VII. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Much of the Court's analysis in that case with reference to backpay has even greater applicability to an award of punitive damages.

In *Albemarle Paper*, a class of African Americans brought suit requesting injunctive relief, and ultimately back pay, in a claim of racial discrimination under Title VII of the 1964 Civil Rights Act as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e et seq. (1970 ed. and Supp. III). The district court found that "the petitioners had 'strictly segregated' the plant's departmental 'lines of progression' prior to January 1, 1964, reserving the higher paying and more skilled lines for whites." A subsequent reorganization of the plant left African American employees "locked in the lower paying job classifications." Accordingly, the district court ordered the petitioners to implement a system of plant wide seniority. 422 U.S. at 409. The court refused, however, to award backpay to the plaintiff class for losses suffered under the "job seniority" program on the grounds that "there was no evidence of bad faith noncompliance with the Act." *Id.* at 410. The court of appeals reversed, ruling that the absence of bad faith was not a basis for denying backpay. *Id.* at 412.

In its review, this Court acknowledged that backpay was not an automatic or mandatory remedy, and that in the first instance these choices are left to district courts. *Id.* at 415. In determining the standards to be applied for backpay awards, courts must be guided "in light of the large objectives of the Act." *Id.* at 416. The Court acknowledged that the primary objective of Title VII was a prophylactic one: "to achieve

equality of employment opportunities and remove barriers [of race discrimination]." *Id.* at 417 (citing *Griggs v. Duke Power Co.*, 401 U.S. at 429-430).

The Court in *Albemarle* acknowledged that the prospect of an injunctive order was insufficient to deter illegal discrimination, and the back pay provision was designed, at least in part, to have this deterrent effect.

> Backpay *has an obvious connection with this purpose*. If employers faced only the prospect of an injunctive order, *they would have little incentive to shun practices of dubious legality*. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *United States v. N. L. Industries, Inc.*, 479 F.2d 354, 379 (CA8 1973).

Id. at 417-418 (emphasis added). The Court ruled that back pay should be denied only where it would not frustrate the "twin statutory objectives" of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.

> It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and rcumstances peculiar to particular cases.

Id. at 421-422. Applying this standard, the Court ruled that the lack of bad faith was an insufficient reason for denying back pay. *Id.* at 422.

Similarly, Amicus suggests, in many cases, the prospect of an injunctive order and compensatory damages creates "little incentive to shun practices of dubious legality." Punitive damages "has an obvious connection with this purpose."

The measure of backpay damages in failure to promote cases is the difference between the amount that the plaintiff actually earned and the amount that he/she would have earned in the position denied but for the illegal discrimination. Typically, the damages in failure-to-promote cases often are minimal. An openly discriminating employer might well conclude that an award of backpay was well worth the price to exclude a protected minority from a key position in management. Only the prospect of punitive damages could effectively deter this illegal conduct.

Many employment positions occupied by either ethnic minorities or women pay less than $10 per hour. Upon being illegally terminated from any employment, employees are required to mitigate damages by exercising reasonable diligence to find a substantially similar job to the one that was lost. *See Ford Motor Co. v. EEOC*, 485 U.S. 219, 231 (1982)(mitigation "requires the claimant to use reasonable diligence in finding other suitable employment"); *Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978)(the defendant must establish that (1) plaintiff failed to exercise reasonable diligence *and* (2) there were substantially similar positions available for which plaintiff could have applied)(emphasis added); *Cassino v. Reichhold Chemical*, 817 F.2d 1338, 1345 (9th Cir. 1987)(similar).

Often such employees are successful in finding an alternative job in a relatively short period of time; two to three weeks. While an award of $1000 back pay might make the plaintiff whole, it would have no deterrent effect on future

discriminatory practices. Quite to the contrary, a racist or sexist employer might conclude that $1000 is well worth the price of discrimination.2

Thus, in many ordinary cases, only nominal damages are recoverable. In such cases, punitive damages represent the only deterrent impact that §1981a can exert. *E.g., Hennessy v. Penril Datacommm Networks, Inc.*, 69 F.3d 1344, 1352 (7th Cir. 1995)("the jury's consideration of the issue of punitive damages was appropriate, even though it did not award compensatory damages"); *Larez v. City of Los Angeles*, 946 F.2d 630, 639 (9th Cir. 1991)(nominal and punitive damages upheld in claim under Section 1983); Ninth Circuit Model Instruction 7.05. Without the potential for punitive damages, there exists not even the pretense of deterrence in those cases where only nominal damages are recovered.

Under the egregious conduct standard applied by the court of appeals, even an employer who openly admitted illegal discrimination would not be subject to an award of punitive damages. 139 F.3d at 961 ("the evidence of the defendant's culpability must exceed what is needed to show intentional discrimination"). Where compensatory damages are minimal or nominal, this type of bigotry would be undeterred. Yet this is exactly the type of discriminatory conduct that the statute was designed to deter.

D. To Fulfill The Statutory Purpose Of Title VII, Punitive Damages Must Be Recoverable In Cases Where An Employer Knew Or Should Have Known That Its Conduct Was Illegal.

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2 Damages for emotional distress would generally add little to the plaintiff's recovery where the length of unemployment is short, and plaintiff received no psychological counseling.

The statutory purpose of Title VII will be undermined unless punitive damages are available when an employer knew or should have known that its conduct was illegal. Applying this standard, the requisite mental state will exist in "garden-variety disparate treatment cases."[3]

Within the context of qualified immunity pursuant to 42 U.S.C. Section 1983, this is a familiar standard applied daily by federal courts.

Reduced to its most basic terms, qualified immunity shields officials from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In making the qualified immunity determination, the initial question is whether the constitutional right at issue was clearly established at the time of the alleged violation. *Davis v. Scherer*, 468 U.S. 183, 197 (1984). The issue of whether the law was clearly established is a question of law for the court, and not for the jury. *Elder v. Holloway*, 510 U.S. 510, 516 (1994); *Davis v. Scherer*, *supra*, at 191-92. An official is only liable if the contours of the right he is alleged to have violated are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The specific action in question need not previously have been held unlawful, but the unlawfulness must be apparent in light of preexisting law. *Id.*4

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3 There exist numerous instances, however, when a finding of liability under Title VII will be insufficient to sustain a finding of punitive damages. In this sense, a finding of liability under Title VII does not automatically or invariably result in a potential award of punitive damages.

4 See also, *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985)("We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement is never explicitly been held to apply to a search conducted in identical circumstances."); *Germany v. Vance*, 868 F.2d 916 (1st Cir. 1989)(It is not necessary for plaintiff to cite cases in which specific conduct complained of was found to be unconstitutional); *Eastwood v. Department of Corrections*, 846 F.2d 627, 630 (10th cir. 1988) (No strict factual correspondence between cases is necessary, "it is incumbent upon officials 'to relate established law to analogous factual setting.'"); *Brady v. Bebbie*, 859 F.2d 1543, 1557 (9th Cir. 1988)("Specific binding precedent is not required to show that a right is clearly established.").

While there are limits to the qualified immunity analogy, this is essentially the suggested standard for punitive damages. Simply treating an employee differently on the basis of sex or race might be insufficient to support a claim for punitive damages where, for example, a bona fide occupational qualification was asserted as a basis for different treatment. Section 703(e)(1) of Title VII permits an employer to discriminate on the basis "of religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. §2000e-2(e)(1). The scope of this exception is frequently a matter of dispute. *E.g., Automobile Workers v. Johnson Controls*, 499 U.S. 187 (1991)(Johnson Controls' fetal-protection policy does not fall within the so-called safety exception to the BFOQ). The "garden-variety" case motivated by bigotry, however, would support an award for punitive damages because the employer knows or should know that such invidious employment discrimination is against the law.

II. THE LOWER COURT'S REQUIREMENT OF A JUDICIAL DETERMINATION OF EGREGIOUSNESS AS A PRECONDITION TO SUBMITTING PUNITIVE DAMAGES TO THE JURY INTRUDES UPON THE CONSTITUTIONALLY PROTECTED ROLE OF THE JURY.

Even if the text of §1981a supported imposing a requirement that the judge find defendant's conduct sufficiently egregious as a precondition to allowing the jury to consider the appropriateness of punitive damages, amicus urges this Court to reject that construction.

In fact, the court of appeals recognized that the two-tier structure of the statutory text could easily be accommodated by allowing the jury to do its job. The court acknowledged that this Court's decision in *Smith v. Wade*, 461 U.S. 30 (1983), suggests "that the determination of that threshold in individual cases has been entrusted by *Smith* -- and hence derivatively by §1981a(b)(1) as well -- to the jury's 'discretionary moral judgment.' *Smith*, 461 U.S. at 52." 139 F.3d at 965. The lower court, however, rejected this reading as upsetting "the traditional relationship between court and jury." *Id.*

Amicus submits that deference to the role of the jury as both factfinder and conscience of the community *is* precisely the traditional relationship between judge and jury. Nowhere is this more true than in the assessment of punitive damages. Amicus further submits that the lower court's allocation of this responsibility to the judge not only upsets the traditional judge-jury relationship, but invades the province of the jury protected by the Seventh Amendment.

Even in cases involving the ultimate penalty of capital punishment, this Court has repeatedly upheld the role of the jury as "conscience of the community." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). "It is the jury's function," the Court has stated, "to make the difficult and uniquely human judgments that defy codification and that 'build discretion, equity and flexibility into a legal system.'" *McKlesky v. Kemp*, 481 U.S. 279, 331 (1987). Amicus suggests that juries perform the same function of expressing community values in determining whether, and to what extent, discriminatory conduct deserves punitive damages.

From its very inception, the remedy of punitive damages has been based on the broad discretion of the civil jury for which judges may not substitute their own views. *See Browning-Ferris Indus. v. Kelco Disposal Inc.*, 492 U.S. 257, 274-75 (1989). This role of the jury in awarding punitive damages in tort actions is generally traced to the lawsuits brought by John Wilkes and his printer against agents of the Crown who conducted an illegal search. *Id.* at n.20. There Lord Chief Justice Camden declared:

> [A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.

Wilkes v. Wood, Lofft. 1, 18-19, 98 Eng.Rep. 489, 498-499 (K.B.1763). *See* Linda Schlueter & Kenneth Redden, Punitive Damages 6-9 (2d ed. 1989)("Lord Camden's recognition of the jury's unfettered discretion in awarding damages was firmly rooted in English legal tradition.")

At the same time the colonists cheered the jury verdict in the Wilkes case, they complained bitterly at the erosion of their own jury rights. Specifically, they complained of England's efforts to shift the adjudication of civil and criminal disputes from colonial courts, where local juries sat, to non-jury tribunals administered by judges beholden to the Crown. Roscoe Pound, The Development of Constitutional Guarantees of Liberty 69-72 (1957); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 654 (1973). The colonists registered their grievance in the Stamp Act Congress, the Continental Congress, and, finally, in the Declaration of Independence ("For depriving us in many cases, of the benefits of Trial by Jury"). Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 595-97 (1993).

When the proposed Constitution failed to include an express guarantee of the right in civil actions, the Antifederalists argued that this omission was sufficient cause to reject the entire Constitution. Even well-intentioned judges can pose a danger to the rights of common people, the Antifederalists asserted, citing Blackstone, who cautioned that judges will frequently have a bias toward those of their own rank. Landsman, *supra*, at 600. The demand for an explicit guarantee of the right to trial by jury led to the adoption of a Bill of Rights as a condition to ratification of the constitution itself. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 295-98 (1966); Wolfram, *supra*, at 667-730 (extensive review of ratification debates).

The Seventh Amendment stands as a limitation specifically directed at the power of the federal judge. Morris S. Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 U. Pa. L. Rev. 829, 832-35 (1980). *See also Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 83 (1989) (White J. dissenting)("The function of the civil jury is to diffuse the otherwise autocratic power and authority of the judge.") Moreover, the framers clearly expected that "the jury would reach a result that the judge either could not or would not reach." Wolfram, *supra*, at 671; Paul B. Weiss, *Reforming Tort Reform: Is there Substance to the Seventh Amendment*, 38 Catholic U. L. Rev. 737, 747 (1989). Historical evidence indicates that the Seventh Amendment was also motivated in part by the intent to preserve the jury's power, exemplified by the *Wilkes* case, to award relatively large punitive damage awards. *See* Alan Howard Scheiner *Judicial Assessment of Punitive Damages, the Seventh Amendment and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 156-59 (1991).

The common-law remedy of punitive damages to be imposed within the discretion of the jury was widely adopted by American courts. By 1851, this Court recognized that punitive damages were "a well established principle of the

common law" in which it "has always been left to the jury, as the degree of punishment to be inflicted must depend on the peculiar circumstances of the case." *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). The Court later noted: "The discretion of the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages is attested by the long continuance of the practice." *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885).

This has been the "traditional relationship between court and jury" with respect to punitive damages. Amicus submits that the lower court's attempt to restrict the jury's exercise of discretion to only "egregious" cases is inconsistent with that relationship.

Mindful of this history, the Supreme Court has consistently emphasized the fundamental nature of the right to jury trials and has viewed any curtailment with great disfavor.

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935), quoted in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959); and in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990).

This Court has continued to preserve the constitutional role of the jury against encroachments by federal judges. For example, in *Hetzel v. Prince William County*, ___ U.S. ___, 118 S. Ct. 1210 (1998), a discrimination case under Title VII and §1983, the Court held that, even where the court determined that the amount of damages was grossly excessive, the Seventh Amendment prohibits the court from substituting its own assessment of the appropriate damages, and requires that the party be given the option of a new trial.

In *Feltner v. Columbia Pictures Television*, ___ U.S. ___, 118 S. Ct. 1279, 1287 (1998), the Court again emphasized that the "right to a jury trial includes the right to have a jury determine the amount of statutory damages, if any, awarded to the copyright owner." *Id.* at 1297, citing, among other authorities, *Wilkes v. Wood, supra*.

It is true that this Court has expressed concern that wholly unfettered jury discretion may result in excessively high punitive damage awards. *Haslip*, *supra* at 18-19. Amicus suggests that the attacks on jury awards have been greatly exaggerated. *See, e.g.*, Stephen Daniels and Joanne. Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 43 (1990). Nevertheless, Congress addressed those concerns by providing a calibrated limit on the amounts of damage awards. 42 U.S.C. §1981a(b)(b). Congress thereby removed this purported justification for restricting the availability of punitive damages under the statute.

For that reason, Justice Blackmun advised, "uncertainty in the historical record should lead us . . . to give the constitutional right to a jury trial the benefit of the doubt." *Granfinaniera, S.A. v. Nordberg*, 492 U.S. 33, 92 (Blackmun, J, dissenting). "If, in the rare case, a tie-breaker is needed," Justice Brennan once counseled, "let us break the tie in favor of jury trial." *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 580 (1990)(Brennan, J., concurring).

CONCLUSION

For the foregoing reasons, Amicus Curiae urges this Court to reverse the decision of the Court of Appeals.

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